

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001912-ME

DOUGLASS M. BLAIR

APPELLANT

v.

APPEAL FROM MEADE CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
ACTION NO. 13-CI-00273

JAMIE R. BLAIR

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, STUMBO AND VANMETER, JUDGES.

STUMBO, JUDGE: Douglass M. Blair appeals from an Order of the Meade Circuit Court rendered on November 12, 2015, adopting the Domestic Relations Commissioner's Report entered on August 14, 2015. He argues that the trial court erred in failing to give sufficient consideration to the evidence when making its custody determination and dividing the marital property. For the reasons stated below, we find no error and AFFIRM the Order on appeal.

Douglass Blair (“Appellant”) and Jamie Blair (“Appellee”) were married on July 3, 2002, in Hardin County, Kentucky. Two children were born of the marriage. Appellant is self-employed and Appellee is employed as a registered nurse at Norton’s Hospital in Louisville, Kentucky.

On August 22, 2013, Appellee filed a Petition for Dissolution and Custody in Meade Circuit Court. The matter came before the Domestic Relations Commissioner for a final hearing on March 26, 2015. After proof was taken, the Commissioner rendered a Report on August 14, 2015, disposing of all matters not previously resolved by the parties. The Commissioner recommended awarding joint custody of the parties’ children with Appellee designated as primary custodian. The Commissioner found that Appellant had the electricity turned off at the residence where Appellee and the children were residing, and had otherwise demonstrated “bad judgment” by failing to contact the children’s school to be made aware of the children’s activities and progress. The Commissioner went on to state that the parties had agreed to the division of marital and non-marital property, and recommended an award of child support payable by the Appellant.

Thereafter, Appellant filed Objections to the Commissioner’s Report. He claimed that the Commissioner erroneously found that the Appellee provided primary care for the children since the parties’ separation. He also argued that the Commissioner’s Report erroneously found that Appellant had turned off the electricity at Appellee’s residence and that such finding had no support in the record. Appellant went on to claim various other errors, including the

Commissioner's finding that Appellant made no attempt to contact the school concerning the children.

On November 12, 2015, the Meade Circuit Court rendered an Order addressing Appellant's objections and bringing the matter to finality. Though not styled as such, the Order is characterized in the record as a Judgment and Decree of Dissolution. Judge Bruce T. Butler ordered that, 1) the Commissioner's finding that Appellant was responsible for turning off the electricity at Appellee's residence was not supported by the record and 2) the Commissioner's Report was in all other respects affirmed and adopted. This appeal followed.

Appellant now argues that the Meade Circuit Court erred by relying on misstated findings in the Commissioner's Report and by not giving sufficient consideration to Appellant's testimony. Specifically, Appellant asserts that contrary to the weight of the evidence, the court improperly concluded that Appellee was the primary caregiver of the parties' children subsequent to the separation. Appellant maintains that he provided at least an equal amount – if not a greater amount – of parenting to the children and that the court erred in failing to so find. Appellant maintains that he sought to introduce a calendar into evidence, along with supportive emails and text messages, demonstrating that he provided an equal amount of parenting time to the children after the separation. He also takes issue with the court's characterization of him exercising “poor judgment” by allegedly turning off the electricity at Appellee's rental house and not keeping in touch with the children's school. He contends that these findings are completely

false and wholly unsupported by the record. The focus of Appellant's claim of error on this issue is that these alleged erroneous findings were improperly applied to the Kentucky Revised Statute (KRS) 403.270 child custody calculus; therefore, the custodial arrangement ordered by the circuit court constituted an abuse of discretion.

KRS 403.270 provides that child custody shall be established based on the best interest of the child and states that,

(2) The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. The court shall consider all relevant factors including:

(a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;

(b) The wishes of the child as to his custodian;

(c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;

(d) The child's adjustment to his home, school, and community;

(e) The mental and physical health of all individuals involved;

(f) Information, records, and evidence of domestic violence as defined in KRS 403.720;

(g) The extent to which the child has been cared for, nurtured, and supported by any de facto custodian;

(h) The intent of the parent or parents in placing the child with a de facto custodian; and

(i) The circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in KRS 403.720 and whether the child was placed with a de facto custodian to allow the parent now seeking custody to seek employment, work, or attend school.

Kentucky Rules of Civil Procedure (CR) 52.01 provides that, “Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.”

Findings of fact are clearly erroneous only if they are manifestly against the weight of the evidence. *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967). These provisions are applicable to child custody cases. *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). When an appellate court reviews the decision in a child custody case, the test is whether the findings of the trial judge were clearly erroneous and constituted an abuse of discretion. *Eviston v. Eviston*, 507 S.W.2d 153 (Ky. 1974).

Child custody was resolved via the Commissioner’s *Pendente Lite* Report rendered on October 28, 2013. Though the Report does not specifically address KRS 403.270, the Commissioner examined all relevant factors. The Commissioner found that subsequent to the parties’ separation, the children have resided with the Appellee with Appellant visiting with them every weekend. The Report noted that Appellee is employed at Norton’s Hospital in Louisville, and typically works 12 hour shifts for 3-4 days per week. The Commissioner found

that Appellant's work schedule varies, but he typically does not work on weekends. Ultimately, the Commissioner recommended that the parties have joint custody, with Appellee being designated as the primary residential custodian. Appellant was granted parenting time on three weekends per month in addition to weekday and holiday times set out in the 46th Judicial Circuit guideline. This recommendation generally reflected the parties' voluntary arrangement after separating.

Having closely examined the record and the law, we must conclude *arguendo* that even if the claims made by Appellant that the findings of fact as to Appellee's residential electricity and Appellant's contact with the school were improper or otherwise do not conform to the record, we cannot conclude based on the totality of the record that the Meade Circuit Court abused its discretion in adopting the Commissioner's *Pendente Lite* Report. As a whole, the findings of fact were not manifestly against the weight of the evidence, *Wells, supra*, and did not constitute an abuse of discretion. *Eviston, supra*. The record contains conflicting testimony and documentary evidence which can reasonably be construed to support more than one conclusion. Our role is not to determine whether different findings or conclusions could have been reached, but rather whether the findings comport with the record and the conclusions based upon said findings are derived by the proper application of the law. The test is not whether we could have decided the issue differently, but whether the findings of the trial court were clearly erroneous or an abuse of discretion. *Cherry v. Cherry*, 634

S.W.2d 423, 425 (Ky. 1982). We find no clear error or abuse of discretion on this issue, and thus no reversible error.

Appellant also argues that the circuit court erred in failing to give sufficient consideration to the evidence when dividing the marital property pursuant to KRS 403.190. He recites much of the testimony and documentary evidence adduced at trial relating to the parties' valuation of a 2005 Chevy Express van, a 2004 Chevy truck and a 1993 Ford Ranger. He directs our attention to the parties' respective Verified Disclosure Statements, as well as his father's testimony that the Chevy truck and a white Mercury Mountaineer were titled in the father's name. Additionally, Appellant makes note of Appellee's retirement account consisting of approximately \$20,000, Appellant's claim that his floor installation business actually was owned in whole or in part by his father, as well as an inventory of various personal items. The corpus of Appellant's claim of error as it relates to these issues is his contention that it was improper for the trial court to award Appellee all of her 401(k) – a marital asset – when there was no equalization in favor of the Appellant.

KRS 403.190 states,

(1) In a proceeding for dissolution of the marriage or for legal separation, or in a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's property to him. It also shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors including:

- (a) Contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;
- (b) Value of the property set apart to each spouse;
- (c) Duration of the marriage; and
- (d) Economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.

(2) For the purpose of this chapter, “marital property” means all property acquired by either spouse subsequent to the marriage except:

- (a) Property acquired by gift, bequest, devise, or descent during the marriage and the income derived therefrom unless there are significant activities of either spouse which contributed to the increase in value of said property and the income earned therefrom;
- (b) Property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent;
- (c) Property acquired by a spouse after a decree of legal separation;
- (d) Property excluded by valid agreement of the parties; and
- (e) The increase in value of property acquired before the marriage to the extent that such increase did not result from the efforts of the parties during marriage.

What constitutes a just division lies within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *Hempel v.*

Hempel, 380 S.W.3d 549, 553 (Ky. App. 2012). There is no statutory basis for dividing a marital estate equally, and an award to one party which almost doubled the award to the other party did not constitute an abuse of discretion. *Wood v. Wood*, 720 S.W.2d 934 (Ky. App. 1986).

The parties appear to have agreed to the disposition of all of the non-marital property and most of the marital property other than Appellee's retirement account and the Appellant's flooring business. The sole issue for our consideration is this provision set out in the Commissioner's Report and adopted by the circuit court: "The [Appellee] shall be designated the owner of her 401(k) through Norton's Hospital. [Appellee] waives any interest in the [Appellant's] business." When applying KRS 403.190 and the supportive case law to the facts before us, we find no basis for concluding that the Meade Circuit Court abused its discretion on this issue. The focus of KRS 403.190 as it relates to the disposition of marital property is that it be divided in just proportions. *Hempel, supra*. Because "just proportions" does not equate to "equal proportions", *Wood, supra*, and as the disposition of the Appellee's 401(k) otherwise conforms to the statutory language, we find no error on this issue.

For the foregoing reasons, we AFFIRM the Order of the Meade Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Matthew E. Durham
Elizabethtown, Kentucky

BRIEF FOR APPELLEE:

No brief filed.